ers except those expressly delegated to the federal government. Those powers which may be *implied* from the express delegations of federal power are likewise surrendered by the states;[40] and a large amount of power must be implied from the express treaty-making power. Thus it is that even in the case of purely domestic affairs which ordinarily fall within the unquestioned regulatory power of the states, if these once become matters of international concern, they are no longer reserved to the states. The mere fact that they have become of sufficient international concern to other nations to cause the making of a treaty is enough to show that under the Constitution they no longer remain within the sphere of state reserved powers, but fall within the power of the federal government, to regulate by treaty, or by legislation passed in order to carry out such treaty.

Were it true that the United States could not enter into treaties affecting matters understood to be generally reserved to the states, since the states have by the Constitution surrendered to the United States the *entire* treaty-making power, the result would be an intolerable restriction upon the power of a sovereign nation. There would be an entire absence of power to make treaties often vitally necessary; such a crippling of the sovereignty of the national government could never be presumed to have been intended by the framers of the Constitution. "To subject the treaty power to all the limitations of Congress in enacting the laws for the regulations of internal affairs would in effect prevent the exercise of many of the most important governmental functions of the nation, in its intercourse and relations with foreign nations, and for the protection of our citizens in foreign countries." [41]

Whether considered in the light of past decisions, or in the light of building up a practical and serviceable framework of government, therefore, there would seem to be no room to doubt the correctness of the three latest decisions [42] upon the scope of the treaty-making power in the United States.

STATE REFERENDUM AND FEDERAL AMENDMENTS. — The Eighteenth Amendment [1] — prohibition's signal victory — has come before the highest courts of several states,[2] and is likely to reach those of others.[3]

[40] McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316 (1819).

[41] United States *v.* Thompson, 258 Fed. 257, 263 (1919).

[42] Cases cited in note 1, *supra*. All alike uphold the power of the United States to provide by treaty for the protection of migratory birds.

[1] "Article —, Sec. 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

"Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress." 40 STAT. AT L. 1941.

[2] Herbring *v.* Brown, Att'y-Gen'l, 180 Pac. (Ore.) 328 (1919); State *v.* Howell, 181 Pac. (Wash.) 920 (1919); Hawke *v.* Smith, 000 N. E. (Ohio) 000 (1919); *In re* Opinion of Justices, 107 Atl. (Me.) 673 (1919).

[3] See Theodore A. Bell, "The Referendum Against National Prohibition," at page 5.

The contention is that in a state which has the initiative and referendum, so called, any amendment to the Federal Constitution must be referred to the people as part of the legislative body.[4] The answers of the courts are not harmonious.[5] But their divergence cannot be rested, as has been attempted,[6] upon the wording of the referendum provisions. In this matter any judicial declaration must involve primarily the interpretation of the amending article of the Federal Constitution.[7]

Congress is therein given, in the last stage of the evolution of an amendment, the choice of two alternative methods of ratification: (1) "by the Legislatures of three fourths of the several States, or" (2) "by Conventions in three fourths thereof." In this instance Congress adopted the former method.[8] So, in order to determine just who, in a particular state, shall take part in the ratification or rejection of an amendment, the courts proceed to exercise their judicial function of construction by seeking to determine what the framers meant when they used the word "Legislatures" in Article V of the Constitution.

Conceivably, either of two things may have been intended by "Legislatures": (1) the periodical representative assembly in each state, or (2) the law-making power in each state.

To adopt the first interpretation will mean that the people in a state having a referendum cannot here make use of that new mode of expressing their will. But such an apparently startling result is not in conflict with the history of the adoption of the Constitution.[9] In that instrument the people of each of the thirteen sovereign states shifted their legal sovereignty to the people of the United States, or more exactly to "the States' governments as forming one aggregate body represented by three-fourths of the several States at any time belonging to the Union."[10] Article V itself accomplishes this shift of sovereign power, for by its provisions the Constitution may be amended in spite of the unanimous vote of the people of any one state, and an amendment proposed by

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[4] This question has received very little attention from text writers. But *cf.* "The people have no direct power either to propose an amendment to the Constitution, or to ratify it after it is proposed and submitted." 2 WATSON, CONST., 1310.

[5] The Ohio court (6 to 1) refused to enjoin the Secretary of State from putting the proposed amendment on the November ballot. Hawke *v.* Smith, *supra*. The Washington court (5 to 4) affirmed the issuance of a writ of mandamus to compel the Secretary of State to submit the amendment to a vote of the people. State *v.* Howell, *supra*. The Oregon court, on the other hand, refused such a mandamus. Herbring *v.* Brown, *supra*. The Maine justices advised Governor Milliken that the amendment need not be referred to the people under Maine's referendum provisions. *In re* Opinion of Justices, *supra*.

[6] Herbring *v.* Brown, *supra*. See State *v.* Howell, *supra*, at p. 927.

[7] U. S. CONST., Art. V.

[8] 40 STAT. AT L. 1050.

[9] "By referring this business to the Legislatures, expense would be saved, and in general it may be presumed that they would speak the general sense of the people. It may, however, on some occasions be better to consult an immediate delegation for that purpose. This is therefore left discretionary." Iredell in North Carolina Convention which ratified the Federal Constitution, 4 ELLIOT, DEBATES, 2 ed., 182, 183. The Constitution went into operation on the day fixed by Congress, March 4, 1789, although it had then been ratified by only eleven states and the Articles of Confederation had required unanimity of approval for all alterations. ARTS. OF CONF., Art. XIII. See 1 STORY, CONST., 5 ed., §§ 278, 279.

[10] DICEY, LAW OF THE CONSTITUTION, 8 ed., 144, 145.

unanimous vote of the people in one state cannot become "the supreme Law" [11] of that state unless it be approved by sufficient sister states to total three fourths of the then existing states.

But the second conceivable meaning of the word "Legislatures" in Article V does find support in the interpretation given the same word elsewhere in the Constitution. "Legislature," or its plural, appears thirteen times in ten connections in the Constitution, each time referring to state legislatures.[12] And on analysis it is clear that neither one of the two conceivable senses was adopted exclusively.[13] For the people as part of the law-making body do not take a "Recess," [14] and yet they may very properly be construed to have a voice in prescribing "The Times, Places and Manners of holding Elections for Senators and Representatives." [15] Therefore, cannot the word as used in Article V be fairly said to mean law-making bodies? For to adopt this second interpretation will mean that the people of a state having a referendum can here make use of that new mode of expressing their will. But however desirable this result may seem to some, the treatment which Article V has received in the past would indicate that this has not been the interpretation. The ratification or rejection of amendments has not been regarded as an exercise of the law-making function. Thus, joint resolutions of ratification by state legislative assemblies are often not signed by the state executives,[16] though state constitutions ordinarily provide that they shall sign all laws either by way of approval or veto.[17] Attempts by a state to revoke a ratification once made have been ignored by the federal government,[18] which surely would recognize a change in a state's laws made by the proper state body. If ratification is not a law-making function, then it is not for the law-making body as such.[19]

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[11] U. S. CONST., Art. VI, § 2.

[12] U. S. CONST. Art. I, Sec. 2, § 1, Sec. 3, § 1, Sec. 4, § 1, Sec. 8, § 17; Art. II, Sec. 1, § 2; Art. IV, Sec. 3, § 1, Sec. 4 (twice); Art. V (twice); Art. VI, § 3. In addition the word "legislature," or its plural, appears in the following amendments: XIV, § 2; XVII, § 1; § 2 (twice).

[13] See 24 HARV. L. REV. 220.

[14] U. S. CONST., Art. I, Sec. 3, § 2.

[15] U. S. CONST., Art. I, Sec. 4, § 1; State *ex rel.* Schrader *v.* Polley, 26 S. D. 5, 127 N. W. 848 (1910); State *ex rel.* Davis *v.* Hildebrant, 94 Ohio St. 154, 114 N. E. 55 (1916). No one will quarrel with the decision of the United States Supreme Court that by giving effect to such an interpretation of Art. I, Sec. 4, Ohio does not cease to have a republican form of government. Davis *v.* Hildebrant, 241 U. S. 565, 36 Sup. Ct. 708, 60 L. Ed. 1172 (1916). See 30 HARV. L. REV. 184.

[16] "This resolution, ratifying the proposed constitutional amendment . . . was not signed by the Governor, nor would it have been vetoed by him." *In re* Opinion of Justices, *supra*, at p. 676. Nor need the Governor sign the resolution submitting a proposed amendment to a state constitution to the people. State *ex rel.* Morris *v.* Mason, 43 La. Ann. 590, 9 So. 776 (1891); Com'lth *ex rel.* Att'y-Gen'l *v.* Griest, 196 Pa. St. 396, 46 Atl. 505 (1900).

Similarly, the President need not sign the resolution of Congress sending a proposed federal amendment to the states. Hollingsworth *v.* Virginia, 3 Dall. (U. S.) 378, 1 L. Ed. 644 (1798). See 1 WILLOUGHBY, CONST., 520 521; 2 WATSON, CONST., 1318 *ff.*

[17] See People *v.* Bowen, 21 N. Y. 517, 519 (1860).

[18] See JAMESON, CONST. CONV., 4 ed., §§ 582, 583.

[19] Nor would it seem that express provision in the Referendum law, such as that in Ohio (November, 1918, CONST. AM., Art. II, §§ 1, 1 *a*), that the people shall vote on proposed federal amendments could make it such in matters involving the Federal Constitution by Article V.

And to grant for the moment that ratification is a law-making function throws one back upon the original problem of which interpretation shall here be given the word "Legislatures."

To outbalance the weight of precedent, an argument of great force is offered, — that here of all places should the people be accurately heard when a change in their Constitution is involved;[20] that to interpret narrowly the word "Legislatures" in Article V will create a danger of unseemly conflicts between outside, direct expressions of popular will and the official expression conveyed through the people's representatives; and that in interpreting a constitution presumptions should always favor whatever construction will best effect the end of all governments — the orderly welfare of their people. And so in deference to this argument let it be recognized that here is a very close question of interpretation.

Article V provides that proposed amendments "shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures," etc., and does not designate a body to determine when such amendments have been ratified, or the validity of the acts of ratifiaction. But Congress by Article V may choose the mode of ratification. Moreover, it is Congress which is empowered "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof."[21] Certainly it is inconceivable that the power of determining the validity of ratification was meant to be vested in any one state, or anywhere but "in the Government of the United States." And Congress has passed a law in this matter providing "That, whenever official notice shall have been received, at the Department of State, that any amendment . . . proposed to the Constitution of the United States, has been adopted, according to the provisions of the Constitution, it shall be the duty of the said Secretary of State forthwith to cause the said amendment to be published . . . with his certificate, specifying the states by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States."[22]

Before that Act of 1818 the first ten amendments had been communicated to Congress by the President,[23] and the eleventh had been declared adopted by the President in a message to Congress, while the twelfth, the Secretary of State by Proclamation declared adopted.[24] After that

[20] On all sides are cries of alarm (see W. L. Marbury, "The Limitations upon the Amending Power," p. 223 *ff.*, *supra*) at the ease with which the twentieth century is effecting changes in a Constitution "whose cumbrous machinery of formal amendments erected in Article V," it was said but a few years ago, one could expect nowadays to be moved by "no impulse short of the impulse of self-preservation, no force less than the force of revolution." WILSON, CONGRESSIONAL GOV'T, 242.

[21] U. S. CONST., Art. I, Sec. 8, § 18. See the valuable discussion of the powers of interpretation really resting in the legislative department, which interpretations are not to be upset by a proper functioning of the judiciary, in THAYER, LEGAL ESSAYS, 7–13.

[22] 3 STAT. AT L. 439; R. S., § 205; U. S. COMP. STAT., § 303.

[23] See 1 WAMBAUGH, CASES ON CONST. LAW, xxvi, note 1.

[24] *Ibid.*, xxvii, notes 1, 2.

Act one Secretary of State referred to Congress ratifications made of doubtful validity by subsequent rejections, and Congress by resolution declared the Amendment adopted.[25] In the immediate case, Acting Secretary of State Polk has declared the Eighteenth Amendment to be "valid to all Intents and Purposes, as part of the Constitution," enumerating, among the necessary three fourths, states having a referendum, whose ratifications had been submitted by joint resolution of the representative assemblies.[26] And Congress has not put the Executive's decision in question, but has proceeded to act on the basis of the amendment's valid adoption.[27]

It would seem, then, that the matter has become something closely akin to a political question. For it is the correctness of the Acting Secretary of state's decision, in which Congress has acquiesced, that is involved. And the courts have refused to consider the correctness or wisdom of congressional action under the constitutional power given Congress to coin money,[28] or of the President's decision that a state of war exists,[29] a decision made by him in his capacity as constitutionally appointed Commander-in-Chief of the Army and Navy. Likewise, the courts have refused to question the State Department's recognition of foreign governments,[30] of which is the sovereign government over certain territory,[31] and its declaration of international boundaries,[32] however absurdly inaccurate[33] the latter may in fact have been.[34] A very close analogy to the present case is suggested in the rule of the majority of courts that proper authentication and enrolment is conclusive evidence of the validity of a statute, and that therefore the court is unable to look into records concerning the passage of an act in order to determine its validity.[35] The result of such cases is that the courts do not on such occasions decide the merits of private rights of individuals before them, and therefore do not exercise their ordinary judicial function.

Constitutional interpretation is unquestionably a judicial function.

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[25] See JAMESON, CONST. CONV., 4 ed., §§ 582, 583; 2 WATSON, CONST., 1314, 1315.

[26] 40 STAT. AT L. 1941. (Proclamation of January 29, 1919. Maine, Ohio, Oregon, and Washington are among the thirty-six states listed therein.)

[27] As indicative of the probable fact that the 65th Congress used the word "legislatures" in its narrow sense, it is worthy of note that Congress provided in the proposed Amendment (note 1, *supra*) that "The Congress *and the several States* shall have concurrent power to enforce this article by appropriate legislation" (Sec. 2), and yet that the article was to be inoperative unless ratified "*by the legislatures of the several States*, as provided in the Constitution" (Sec. 3). [The italics are the Editor's.]

[28] Legal Tender Cases, 110 U. S. 421, 4 Sup. Ct. 122, 28 L. Ed. 204 (1883).

[29] Prize Cases, 2 Black (U. S.), 635, 17 L. Ed. 459 (1862).

[30] Oetjen *v.* Central Leather Co., 246 U. S. 297, 38 Sup. Ct. 309, 62 L. Ed. 726 (1917); Ricaud *v.* American Metal Co., 246 U. S. 304, 38 Sup. Ct. 312, 62 L. Ed. 733 (1917).

[31] Jones *v.* United States., 137 U. S. 202, 11 Sup. Ct. 80, 34 L. Ed. 691 (1890).

[32] Foster *v.* Neilson, 2 Pet. (U. S.) 253, 7 L. Ed. 415 (1829).

[33] See *In re* Cooper, 143 U. S. 472, 499 *ff.*, 12 Sup. Ct. 453, 459 *ff.*, 36 L. Ed. 232, 240, 241 (1891): The James G. Swan, 50 Fed. 108 (1892).

[34] Again, the Maryland court referred in mandamus proceedings against the state executive to declare "the rule of law which ought to guide the discretion of the Governor in this ascertainment of the result of the late election had for the adoption or rejection of the 'New Constitution.'" Miles *v.* Bradford, 22 Md. 170 (1864).

[35] Lyons *v.* Woods, 153 U. S. 649, 14 Sup. Ct. 959, 38 L. Ed. 854 (1894); State *v.* Septon, 3 R. I. 119 (1855); People *v.* Harlan, 133 Cal. 16, 65 Pac. 9 (1901); Cox *v.* Pitt County, 146 N. C. 584, 60 S. E. 516 (1908).

Could the word "Legislatures" in Article V have reached the courts, in a proper case demanding interpretation, before the proclamation of January 29, 1919, then the courts might with propriety have declared themselves. But by that proclamation the political departments of the government have expressed themselves. To avoid conflict with those departments has always been the aim of state and federal courts, under the leadership of the United States Supreme Court.[36] And it is submitted that here, without shirking responsibility or without departing from precedent,[37] the Judiciary may refrain from all action except the adoption and application of that interpretation of Article V already declared by the other two branches of the federal government.

STATE CONTROL OVER INTERSTATE BRIDGES. — That constitutions should be regarded as living instruments, the fundamental principles of which are applicable to varying conditions, is illustrated in the history of our "commerce clause." [1] It is a significant fact that until 1860 only twenty cases involving its construction had been submitted to the Supreme Court; while today, because of the breadth of its application and the diversity of interests involved, probably no other clause of the Constitution must be considered so often by our federal tribunals. The construction of the clause as applied to interstate commerce has been varied, and it is impossible to reconcile the language of the various decisions. But throughout there has been the steady development of a fundamental principle. Until the case of *Gibbons* v. *Ogden* [2] it was doubted whether the clause gave Congress control of navigation when carried on among the several states. In that case the view was taken that the national power is "exclusive," even when dormant.[3] This was questioned in *Willson* v. *Blackbird Creek Co.*,[4] and in the *License Cases* [5] it was limited in favor of state regulation where Congress had not acted. The basis of the modern rule was first adopted as the rule of decision in *Cooley* v. *Port Wardens*.[6] The general principle there applied was that the power of Congress is exclusive as to those subjects which require uniformity; while in peculiarly local matters the states may act within

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[36] Cases cited in notes 28 to 34, *supra*.

[37] "In forming the constitutions of the different States, after the Declaration of Independence, and in the various changes and alterations which have since been made, the political department has always determined whether the proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision." Taney, C. J., in Luther *v.* Borden, 7 How. (U. S.) 1, 39, 12 L. Ed. 581, 597 (1849).

[1] U. S. CONST., Art. I, Sec. 8, clause 3: Congress shall have power "To regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

[2] 9 Wheat. (U. S.) 1 (1824).

[3] See also Brown *v.* Maryland, 12 Wheat. (U. S.) 419 (1827).

[4] 2 Pet. 245 (1829).

[5] 5 How. (U. S.) 504 (1846).

[6] 12 How. (U. S.) 299, 319 (1851).